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February 22, 2011

*Stephanie Delgado*  
*2-23-11*

**HAND DELIVERY**

Mr. Valmichael Leos  
EPA Project Coordinator (6SF-RA)  
United States Environmental Protection Agency  
Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202

Re: San Jacinto River Waste Pits Superfund Site -- Administrative Settlement  
Agreement and Order on Consent for Removal Action -- Notice of Dispute

Dear Mr. Leos:

Respondents, International Paper Company and McGinnes Industrial Maintenance Corporation, are in receipt of two Notices of Violation ("NOVs") from the United States Environmental Protection Agency ("EPA") Region 6 dated January 21, 2011 ("January 21 NOV") and January 24, 2011 ("January 24 NOV"). The January 21 NOV alleges a violation of the above-referenced Administrative Settlement Agreement and Order on Consent ("AOC"), based on the alleged failure by Respondents to "commence clearing and grubbing the peninsula portion of the western waste pit" by January 21, 2011. The January 24 NOV alleges that Respondents failed to comply with the AOC by not commencing water side placement of Section B of the Armor Cap over the eastern waste impoundment on January 24, 2011. The deadlines that Respondents have allegedly failed to meet were included in the Draft Final Schedule (the "Schedule") approved by EPA Region 6 on December 15, 2010 for the Time Critical Removal Action ("TCRA") pursuant to the AOC.

This letter constitutes Respondents' notice under Section XVI of the AOC of their objections to the January 21 NOV and the January 24 NOV. For purposes of this notice, Respondents incorporate by reference, as if fully set forth herein, their notice of dispute dated February 14, 2011 with respect to the NOV from EPA dated January 14, 2011 ("February 14 Notice of Dispute") and their notice of *force majeure* dated December 30, 2010 and supplemental submissions thereto dated January 4, 2011, January 5, 2011 and January 28, 2011 (collectively, "*Force Majeure* Letters"). Respondents also incorporate herein by reference Respondents' letters dated June 1, July 1, July 30, September 30, November 1 and November 30, 2010 and January 5, 2011 describing their "best efforts" to obtain access to (i) the I-10 right-of-way of the Texas Department of Transportation ("TxDOT") that borders the San Jacinto River



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Waste Pits Superfund Site ("Site") and (ii) the property of Big Star Barge & Boat Company, Inc. ("Big Star") that also borders the Site (collectively, "Best Efforts Letters").

Respondents object to and dispute the allegations contained in the January 21 NOV and the January 24 NOV for the reasons and on the same basis that they objected to the January 14 NOV in the February 14 Notice of Dispute. As addressed in the February 14 Notice of Dispute, Respondents dispute that the dates contained in the Schedule can provide a basis for EPA to assert that Respondents are in violation of the AOC or for the imposition of stipulated penalties since these dates were based on the availability of certain access that did not materialize as assumed when the Schedule was developed. Moreover, "compliance" as defined in the AOC is based on the completion of activities in accordance with the Schedule, not whether actions are occurring on a "start date" in the Schedule.

With respect to the January 21 NOV, even if it is assumed for purposes of argument that the Schedule does provide a basis for a violation and/or the imposition of stipulated penalties, clearing and grubbing on the western impoundment had commenced as of January 21, 2011. Clearing and grubbing activities on the central berm and in adjacent portions of the western impoundment took place during the week of December 20, 2010, as reflected in the attached photograph that was taken on January 7, 2011 ("Exhibit A"). The photograph was taken looking north along the central berm of the waste impoundments. To the left is the western impoundment and to the right is the eastern impoundment. The photograph shows that some clearing and grubbing had taken place on the western impoundment as of the date of the photograph. The continuation of that work is scheduled to commence on February 25, 2011, based on the revised schedule that has been presented to EPA after Respondents obtained access to the TxDOT right of way.

Regarding the January 24 NOV (and again if it is assumed for purposes of argument that the Schedule does provide a basis for a violation and/or the imposition of stipulated penalties), the placement of Section B of the Armor Cap over the eastern waste impoundment could not commence on January 24, 2011 for the same reasons that construction of other portions of the Armor Cap could not commence by the dates set forth in the Schedule. Those reasons are detailed in Exhibit B to the February 14 Notice of Dispute as to commencement of construction of Section C2 of the Armor Cap. The same reasons apply with respect to Section B of the Armor Cap. To summarize, those reasons are (1) construction materials (rock) were not available because Respondents were unable to lease the property of Big Star Barge & Boat Company, Inc. for a material stockpile area, and (2) access via the TxDOT right-of way had not been secured.<sup>1</sup>

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<sup>1</sup> On January 24, 2011, TxDOT confirmed to Respondents that they would be provided with access to the TxDOT right-of-way, but as of that date, Respondents were not in a position to access the waste impoundments via the right-of-way, given the need first to obtain EPA approval of revised plans for construction of improvements in the right-of-way and then to construct the road necessary to allow construction materials to be brought to the needed locations. In addition, as set forth in Exhibit B to the February 14 Notice of Dispute Letter, construction materials were not available as of that date because Respondents had not yet finalized a lease for property on which construction materials could be stockpiled and from which materials could be transported to the Site.



Under the revised schedule that was presented to EPA after access to the right-of-way was obtained and a lease had been finalized for a material stockpile and trans-shipment facility, Respondents commenced placement of Armor Cap materials over the eastern impoundment on February 17, 2011.

At your direction, Respondents submitted to EPA Region 6 on February 14, 2011 a further revised TCRA work schedule that identifies milestones for Armor Cap placement as if the TCRA work will progress from the placement of one armor type to the next. In reality, and as has been explained to EPA Region 6 (most recently at a February 18, 2011 technical meeting between Respondents' consultants and EPA representatives), any precise timetable or schedule for Armor Cap placement will not necessarily coincide with actual progression of construction activities in the field. In the field, the actual progression of Armor Cap placement will be dependent upon a number of environmental and logistical factors, including but not limited to the following:

- Effects of high and low tide on water levels and therefore access to the work areas
- Effects of prevailing winds on water levels and therefore access to the work areas
- Schedule of trains for the delivery of natural stone for the project and availability of rock stockpiles
- The need to perform the work in a methodical manner so that work in specific areas is not disturbed or impacted by subsequent activities.

These factors will necessarily result in a construction sequence whereby the placement of aggregate materials will occur as the contractor is able to access various areas and as the appropriate aggregate material is on hand. The contractor must retain the flexibility to move from area to area and Armor Cap to Armor Cap as conditions allow. Forcing the strict adherence to sequencing of activities in a schedule, is not feasible and would potentially cause significant delays in the overall timetable for completing the work project. Thus, the various "start dates" in the Schedule are always subject to change and the "finish dates" are subject to access and other *force majeure* considerations.

Two communications received from counsel for EPA Region 6 last week, after the February 14 Notice of Dispute was submitted, require comment in connection with this notice letter. First, Respondents received a letter dated February 16, 2011 from counsel for EPA Region 6 which responds to the *Force Majeure* Letters and to Respondents' January 5, 2011 letter summarizing their best efforts to obtain access ("EPA February 16 Letter"). Respondents intend to respond to the EPA February 16 Letter, and reserve the right to supplement this notice letter to incorporate their response to the EPA February 16 Letter and to otherwise respond to matters set forth in the EPA February 16 Letter. As they did with respect to the February 14 Notice of Dispute, Respondents reserve the right to supplement this notice, based on additional information that comes to light regarding the matters discussed herein. Second, Respondents' counsel received an email from counsel for EPA Region 6 dated February 16, 2011, stating that the February 14 Notice of Dispute was premature and that Respondents would have a right to dispute resolution only after EPA demands payment of stipulated payments. Respondents

interpret applicable provisions of Section XVI of the AOC to permit Respondents to submit a timely notice of dispute with respect to any matter arising under the AOC to which they object and want to avoid any claim that they have waived their opportunity to dispute EPA Region 6's determinations that Respondents have violated the AOC, as reflected in the NOV's.

Respondents hope that the disputes addressed in this letter, together with the disputes that are addressed in the February 14 Notice of Dispute, can be resolved expeditiously so that the focus of the Respondents and EPA can be fully directed toward completion of the TCRA and the ongoing activities under the Unilateral Administrative Order. If you have any questions, please do not hesitate to call.

Sincerely,

*Albert R. Axe, Jr.  
by David Ramsey, with permission*  
Albert R. Axe, Jr.

ARA/sd  
Enclosure

cc: Barbara Nann – EPA Region 6  
John Cermak  
Sonja Inglin  
David Keith

EXHIBIT A



